Supreme Court, U.S.
FILED
JUL 17 2006
OFFICE OF THE CLERK

No. 05-1464

In The
Supreme Court Of The United States

JO-ANN DARK-EYES
Petitioner,

v.

COMMISSIONER OF REVENUE SERVICES
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CONNECTICUT SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the Connecticut Supreme Court correctly determined that the "private settlement lands" identified by the Connecticut Indian Land Claims Settlement Act, 25 U.S.C. §§ 1751-1760, were not "set aside" and therefore do not qualify as a "dependent Indian community" under 25 U.S.C. § 1151(b)?

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COUNTER-STATEMENT OF THE CASE

This case presents the question whether the income of a single member of a federal Indian tribe was exempt from the State of Connecticut's income tax from 1993 through 1998. In resolving this issue, the Connecticut Supreme Court properly applied well established precedent from this Court and federal statutes in concluding that the tribal member did not reside in Indian country, and therefore was not entitled to an exemption for the years in question. This Court's review of the Connecticut Supreme Court's decision would have no precedential impact beyond Connecticut and little impact even within this State due to the unique and highly specific factual circumstances this case involves.

The sole reason the petitioner provides for granting this petition is that the Connecticut Supreme Court allegedly failed to apply the Indian canon of construction, which provides that doubtful expressions of legislative intent should be resolved in favor of Indians. Contrary to the petitioner's claim, the Connecticut Supreme Court expressly recognized and applied the Indian canon. Indeed, the court applied the canon to rule in the petitioner's favor—and overrule the trial court—on an important predicate issue. Pet. 12a-13a (discussing Indian canon); Pet. 23a (expressly applying the Indian canon in rejecting argument advanced by the respondent). There is patently no merit to the petitioner's claim that the Connecticut Supreme Court failed to apply the Indian canon.

It is evident that the petitioner's real claim is that this Court should grant review because the Connecticut Supreme Court erred in applying a properly stated rule of law. Petitions for certiorari are rarely granted on such claims and there is nothing in this petition or the Connecticut Supreme Court's decision to suggest this case

should be an exception to that rule. The Connecticut Supreme Court did not err. The court conducted a detailed analysis of the Connecticut Indian Land Claims Settlement Act's (the "Connecticut Settlement Act" or the "Act") text and concluded that it clearly and unambiguously did not set aside the property at issue under this Court's precedent. This Court has consistently made clear—as recently as its decision in *Chickasaw Nation v. United States*, 534 U.S. 84 (2001)—that the Indian canon cannot override the clear text of a statute.

The Connecticut Supreme Court properly stated the law and correctly applied it to the unique facts presented to resolve a narrow issue. There is no reason, compelling or otherwise, to grant this petition.

Background

The parties stipulated to the following relevant facts below:

In 1983, the United States Congress enacted the Connecticut Indian Land Claims Settlement Act for the purpose of implementing a settlement agreement in a civil action initiated by the Mashantucket Pequot Indian Tribe (the "Tribe") to recover "Indian lands" from individual private property owners in Ledyard, Connecticut. 25 U.S.C. § 1751 *et. seq.*; Pet. 54a-64a.

The Act extended federal recognition to the Tribe. In addition, the Act established an initial reservation for the Tribe and a Settlement Fund pursuant to which the United States could purchase land from willing sellers at fair market value within a statutorily designated settlement area (the "Settlement Lands") for the benefit of the tribe. Certain lands purchased with Settlement Funds were deeded directly to the United States in trust for the Tribe. Certain other lands purchased by the Tribe within the

Settlement Lands with funds other than Settlement Funds have since been transferred to the United States to be held in trust for the Tribe for its reservation. Since 1983, when the Settlement Act was enacted, the Tribe has purchased some, but not all, of the land within the Settlement Lands and the United States has accepted some, but not all, of the Settlement Lands in trust for the benefit of the Tribe.

The petitioner is a Connecticut resident and an enrolled member of the Tribe. From November 1, 1993 through September 30, 1998, she resided at 59 Coachman Pike, in Ledyard, Connecticut (the "Coachman Pike Property" or the "Property"), which was located within the Settlement Lands and owned by the Tribe in fee until August 25, 1998. At that time, the Property was conveyed by the Tribe to the United States to be held in trust for the Tribe as part of its reservation. Prior to August 25, 1998, when the Tribe owned the Property in fee, the Tribe paid property taxes on it to the Town of Ledyard. The Tribe did not claim that the Property was exempt from taxation as "Indian country."

For the taxable years 1996, 1997 and 1998, the petitioner claimed that she was exempt from the Connecticut income tax on the grounds that she was an enrolled member of the Tribe and resided in "Indian country". The State of Connecticut Department of Revenue Services (the "Department") disagreed, concluding that the Coachman Pike Property where the petitioner resided did not become "Indian country" until it was transferred to the United States to be held in trust for the benefit of the Tribe as part of its reservation on August 25, 1998. The petitioner appealed the Commissioner of Revenue Service's ("Commissioner") determination to the Connecticut Superior Court, which affirmed the Commissioner's decision.

The petitioner then appealed to the Connecticut Supreme Court, which affirmed the trial court's decision and ruled in favor of the Commissioner on the merits. In that appeal, the petitioner pressed two primary claims. Pet. 8a. The first was that the trial court erred in applying a more restrictive definition of "Indian country" under the Settlement Act than that provided for in 18 U.S.C. § 1151. *Id.* The second was that the trial court erred by concluding, in the alternative, that the Property was not a dependent Indian community. *Id.*

Although the Connecticut Supreme Court ultimately ruled in the Commissioner's favor on the merits, it ruled in the petitioner's favor on her first argument and held—contrary to the decisions by the trial court and the Department—that the Settlement Act incorporated the broader definition of "Indian country" under 18 U.S.C. § 1151, even though the Settlement Act's only reference to "Indian country" provides that "'the reservation of the Tribe is declared to be Indian country.'" Pet. 19a-20a (quoting 25 U.S.C. § 1755). In so holding, the Court noted that its interpretation raised questions in light of the statutory text, but concluded that the Commissioner's construction "would contravene basic rules of construction . . . that are applicable to Indian sovereignty," specifically that "[s]tatutes are to be construed in favor of the Indians, with ambiguous provisions interpreted to their benefit." Pet. 20a, 23a (quotation marks omitted); *see also* Pet. 12a-14a (discussing the Indian canon in detail).

The Connecticut Supreme Court's conclusion that the Settlement Act incorporates 18 U.S.C. § 1151's definition of "Indian country" led the court to address whether the Property was a dependent Indian community and, therefore, Indian country. There is no dispute that the relevant rule of law on this issue comes from this Court's decision in *Alaska v. Native Village of Venetie Tribal*

Government, 522 U.S. 520 (1998) ("*Venetie*"). Pet. 3 (citing *Venetie* framework for analysis of the question presented). There is also no dispute that the Connecticut Supreme Court properly stated that rule of law, which requires that "(1) set aside and (2) superintendence" be shown to establish that land is a dependent Indian community. Pet. 25a (citing *Venetie*, 522 U.S. at 530); *see also* Pet. 3 (using identical language to set out applicable rule).

In applying *Venetie*'s rule of law to the specific and unique factual circumstances presented, the court conducted a detailed analysis to determine whether the Settlement Act "set aside" the Property as a dependent Indian community. It began that analysis with a lengthy discussion of the case law—from this Court and others—setting forth the parameters of the set aside inquiry. Pet. 27a-30a. The court then applied those principles to the text of the Settlement Act and concluded that the Act unambiguously did *not* create a set aside for three reasons. "First and foremost, the settlement act extinguished the tribe's aboriginal or tribal title to any of the private settlement lands as a condition of receiving the settlement fund." Pet. 30a-31a (footnotes omitted; citing 25 U.S.C. § 1753). "Second, the act provided a limited window of opportunity for the tribe to use the settlement fund to obtain private settlement lands." Pet. 32a. Lastly, the text of the Act shows that "the focus of the settlement act clearly is on the disbursement of the settlement fund, not the purchase of the land." Pet. 33a-34a. Thus, the Connecticut Supreme Court concluded, following a detailed analysis based on the proper rule of law, that the text of the Act established that the Property was not set aside as a dependent Indian community.

Having concluded that the text of the Act was clear and unambiguous, the court nonetheless went on to address

the Act's legislative history—on which the petitioner based much of her argument below and in this petition—and concluded that it supported the court's interpretation of the statutory text. Pet. 30a-33a (discussing in detail the "several aspects" of the statutory text that clearly indicated the Act did not create a set aside and then discussing legislative history only to the extent there was "any plausible ambiguity" in the text). Specifically, the Act's history showed "that the parties were well aware that some of the property owners within the private settlement lands would choose not to sell their property to the tribe within the time allotted, and the agreement was designed to accommodate the nontribal ownership." Pet. 35a. "In light of the unequivocal evidence as to holdout landowners within the private settlement lands," the court could not "read Congress' failure to provide any mechanism for the tribe to acquire such lands should they later become available as a mere oversight." *Id.*

The court then addressed the statements in the legislative history "indicating that the tribe may have viewed the settlement as an agreement for land and not for money, and that it expected almost all of the settlement lands to be purchased with the allotted funds," which provided much of the support for the petitioner's argument below and the theme for this petition. Pet. 3, 13. The court correctly concluded—consistent with this Court's decisions—that "[t]he tribe's hopes and expectations as to the land . . . are enforceable only to the extent that they are embodied in the settlement act." Pet. 36a. Because the text of the Act belied those expectations, the petitioner's claim failed.

The court concluded by noting that—in light of its detailed analysis of the Act—"[p]ut simply, it is too far a stretch to conclude that establishing a finite settlement fund for economic development and land purchase evidences a

federal intent to give the tribe presumptive sovereignty over the Coachman property by making it Indian country." Pet. 36a. "'It seems implausible that a tribe could obtain a valid claim to Indian country—and thus presumptive sovereignty rights—over theretofore privately-held lands just by purchasing them.'" *Id.* (quoting *Narragansett Indian Tribe of Rhode Island v. Narragansett Electric Co.*, 89 F.3d 908, 922 (1st Cir. 1996)). That would allow state and local governments to have lands taken out of their jurisdiction without notice or an opportunity to negotiate an agreement to avoid that result. *Id.* That is not a reasonable view of the Act, which

> at best evidences an intent to assist in the economic development of the tribe and to allow it to acquire those lands within the designated area that the private landowners had agreed to sell to the tribe during settlement negotiations without necessarily incurring a commitment to exercise jurisdiction over all activities on that land, whenever acquired by the tribe, to the presumptive exclusion of state laws.

Pet. 37a. Thus, the court concluded that "there is no set aide" and did not need to address the second part of the *Venetie* inquiry, whether the Property was "under the superintendence of the United States before being taken into trust." *Id.*

REASONS FOR DENYING THE WRIT

I. THE PETITION PRESENTS ONLY NARROW ISSUES OF LOCAL SIGNIFICANCE THAT DO NOT WARRANT REVIEW BY THIS COURT

In seeking this Court's review of the Connecticut Supreme Court's decision that the income of a single member of a federal Indian tribe residing on a specific parcel of property was not exempt from the State of Connecticut's income tax from 1993 through 1998, this petition presents a question relating to the interpretation of a statute—the Connecticut Indian Land Claims Settlement Act—that, as the petitioner acknowledges, is specific to a single tribe and concerns land in a single State. Pet. 13. This petition simply does not raise an issue of national importance that requires a portion of this Court's "scarce judicial resources." *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985).

It is difficult to imagine a case involving a federal statute that would have less national impact than this one. The Connecticut Settlement Act involves only the Mashantucket Pequot Tribe and impacts a small amount of land in Connecticut. *See* 25 U.S.C. § 1752. The narrow scope and applicability of the statute counsels strongly against granting the petition, as a decision by this Court would have—at most—a minor impact. Indeed, it will likely have no impact at all because, as discussed in detail below, the Connecticut Supreme Court's decision is correct and would likely be affirmed.

The petitioner's efforts to ascribe national significance to this purely local issue are insufficient on their face. The petitioner claims that this Court's intervention is necessary because the Connecticut Supreme Court failed to apply the Indian canon to the Connecticut

Settlement Act and, in a related vein, because this Court has not provided sufficient guidance as to what constitutes a "set aside" under 18 U.S.C. § 1151. Pet. 3. Neither of those reasons survives scrutiny.

The claim that the Connecticut Supreme Court failed to apply the Indian canon to the Connecticut Settlement Act is patently incorrect. As will be discussed in detail below, the court properly stated the rule of law, expressly applied the Indian canon in the petitioner's favor to reject an argument advanced by the Commissioner and properly applied it otherwise.

The assertion that this Court has not provided sufficient guidance as to the circumstances that create a "set aside" likewise lacks merit. In support of the supposed lack of guidance, the petition places heavy emphasis on the Connecticut Supreme Court's dicta that "'the precise circumstances necessary to satisfy a set aside have not been clearly delineated by the courts.'" Pet. 12 (quoting *Dark-Eyes*, 276 Conn. at 588; emphasis in petition). The court's statement is not surprising—it would be impossible to "clearly delineate" the "precise circumstances" governing any inquiry as fact-specific as whether specific land has been set aside.

It does not follow that the Connecticut Supreme Court lacked sufficient guidance to determine whether the Coachman Property was set aside and that this Court's intervention is therefore necessary. Indeed, the same sentence the petitioner emphasizes goes on to state that "prior case law examining the issue provides some illumination" and the Connecticut Supreme Court proceeded to discuss that case law—including multiple decisions from this Court—in detail. Pet. 28a. Tellingly, the petition does not point to a single conflict between the Connecticut Supreme Court's decision and any of the

decisions that court cited in setting out the contours of the set aside determination. Pet. 27a-30a. That indicates that—contrary to the petitioner's assertions—this Court's previous decisions and the existing case law provide ample guidance.

Given the limited scope and impact of the statute at issue, the unique facts involved and the lack of any conflict between the Connecticut Supreme Court's decision and the existing case law, there is no need for a decision by this Court and the petition should be denied.

II. THE CONNECTICUT SUPREME COURT'S UNANIMOUS DECISION PROPERLY STATED THE RULE OF LAW, APPLIED IT CORRECTLY AND DOES NOT CONFLICT WITH THIS COURT'S PRECEDENT OR THAT OF ANY OTHER COURT

The focal point of the petition is the Connecticut Supreme Court's alleged failure to apply the Indian canon of construction in interpreting the Connecticut Settlement Act. In reality, the court *did* explicitly recognize *and apply* the canon. The gravamen of the petitioner's claim—that the court erred because it did not apply the canon to contradict the text of the Act—has no merit. The Connecticut Supreme Court's unanimous decision correctly declined to apply the Indian canon to supersede the unambiguous text of a federal statute, consistent with this Court's precedent and decisions of other courts.

A. The Connecticut Supreme Court Applied the Indian Canon to Find in the Petitioner's Favor on the Applicable Definition of "Indian Country"

The petition claims that the Connecticut Supreme Court failed to apply the Indian canon of interpretation. Pet. 3, 13-14. That simply is not true. In setting forth the applicable principles of statutory construction, the decision expressly referenced the Indian canon as set forth by this Court, stating, *inter alia*, that: "[w]hen interpreting statutes implicating Indian affairs, . . . [s]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Pet. 12a. The court went on to state that "[i]n determining [congressional] intent, we are cautioned to follow the general rule that doubtful expressions are to be resolved in favor of [those] who are the wards of the nation, dependent upon its protection and good faith." *Id.* (quoting *Conn. ex rel. Blumenthal v. United States Dept. of the Interior*, 228 F.3d 82, 92 (2d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001)); *see also Conn. ex rel. Blumenthal*, 228 F.3d at 92 (applying Indian canon of construction and relying on *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985), *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) and *Jones v. Meehan*, 175 U.S. 1 (1899)).

The decision proceeded to note that although the Connecticut Supreme Court "was mindful that the United States Supreme Court has stated recently that the Indian construction canon is not a mandatory rule," the canon remains viable even where, as here, the Tribe at issue has "tremendous wealth." Pet. 12a n.12 (citing *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001)). Thus, there can be no doubt that the Connecticut Supreme Court properly stated the applicable rule of law. That strongly militates against granting this petition. As this Court's rules expressly state, "[a] petition for a writ of certiorari is

rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

This case does not present the rare circumstances that could justify granting a petition despite the court below having applied the correct rule of law. The Connecticut Supreme Court went beyond just properly recognizing and stating the Indian canon. It went so far as to apply that canon in the petitioner's favor to reject a separate argument made by the Commissioner that both the trial court and the agency had found persuasive. Pet. 6a-7a, 23a.

The first part of the analysis in the decision below addressed whether the Act defined "Indian country" to include only land that is part of the Tribe's reservation or incorporated the broader, generally applicable, definition of "Indian country" under 25 U.S.C. § 1151. Pet. 14a-23a.

The Commissioner argued that the Act defines "Indian country" to include only reservation land. That reading finds substantial support in the "only reference to Indian country in the settlement act," which provides that "'the reservation of the Tribe is declared to be Indian country.'" Pet. 17a-18a, 19a (quoting 25 U.S.C. § 1755). By necessary implication, that express statement in the text classifying only reservation land as "Indian country"—with no mention of the other well-established categories of "Indian country" under § 1151—indicates clear and unambiguous congressional intent that a more limited definition of "Indian country" apply to the Act.

Because the text of the statute is arguably unambiguous on the question, the Indian canon—on which the petitioner bases her petition—is not applicable. This Court made that clear in *Chickasaw Nation*, holding that the Indian canon is no more than a guide that "need not be conclusive" and that it cannot be used to create an "interpretation that . . . would conflict with the intent embodied in the statute Congress wrote." *Chickasaw*

Nation, 534 U.S. at 95. Thus, the Connecticut Supreme Court could, and should, have agreed with the Commissioner's argument below—as did both the trial court and the agency—and ruled against the petitioner without the Indian canon even coming into play.

The Connecticut Supreme Court, however, held that the broader definition of Indian country under § 1151 applied to the Act, despite acknowledging that its reading raised a question "as to why Congress would indicate that the tribe's reservation is Indian country if not intending to limit the meaning of Indian country because a reservation is only one of three ways of establishing Indian country under § 1151." Pet. 20a. In so doing, the court expressly relied in part on the Indian canon, noting that the interpretation advanced by the Commissioner "would contravene basic rules of construction previously noted that are applicable to Indian sovereignty" and reiterating that "[s]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Pet. 23a (quotation marks omitted).

That conclusion weighs against this Court granting the petition in two significant respects. The first is that it raises questions about the viability of this case as a vehicle to reach the question presented. The Connecticut Supreme Court's decision to apply the Indian canon to contradict the unambiguous text of the Act on a preliminary issue is itself contrary to this Court's decision in *Chickasaw Nation*. That is a predicate issue to the question presented and a ruling in respondent's favor on that basis—which *Chickasaw Nation* requires—would be of limited applicability and would preclude this Court from reaching the merits of this petition. *See* Supreme Court R. 14.1 ("The statement of any question presented is deemed to comprise every subsidiary question fairly included therein.").

The second, and more fundamental, reason why the Connecticut Supreme Court's reliance on the Indian canon to reject the Commissioner's argument counsels against granting the petition is that it completely undercuts the premise on which the petition is based; namely, that the Connecticut Supreme Court failed to apply the Indian canon. Pet. 3, 13-14. The decision makes clear that the court did recognize and apply the canon—it simply declined to apply it to override the requirements this Court set forth in *Venetie* to establish whether land is part of a dependent Indian community and therefore Indian country for purposes of § 1151.[1]

B. The Connecticut Supreme Court Correctly Declined to Apply the Indian Canon to Re-write the Act and Allow the Tribe to Unilaterally Create Indian Country

Despite the Connecticut Supreme Court's proper statement of the Indian construction canon and application of that canon to rule in the petitioner's favor on an important predicate issue below, the petition claims that review by this Court is necessary because the Connecticut Supreme Court did not apply the Indian canon to allow the Tribe to unilaterally create Indian country by purchasing land with its own funds. That argument has no merit. The Connecticut Supreme Court correctly held that the text of the Act unambiguously does not create a set aside and this Court has made clear that the Indian canon cannot be used

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[1] The petitioner has limited the question presented to whether the lands at issue were set aside for purposes of the Indian country determination. She does not challenge the Connecticut Supreme Court's conclusion that the land did not qualify as a formal reservation, informal reservation or an allotment during the pertinent time period. Pet. 24a & n.22.

to reach a result contrary to unambiguous statutory text. *See Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). The Connecticut Supreme Court's decision was correct and review by this Court is not necessary.

The dispositive question addressed by the Connecticut Supreme Court was whether the Act set aside the Coachman Property "as a dependent Indian community under § 1151(b) before [the Property was] . . . taken into trust." Pet. 25a. Again, the Connecticut Supreme Court properly stated the applicable rule of law, which comes from this Court's decision in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998).[2] *Venetie* "established a two-pronged test requiring, (1) set aside and (2) superintendence" to be shown before property can qualify as a dependent Indian community. Pet. 25a (citing *Venetie*, 522 U.S. at 530). Both prongs must be satisfied for the property to be a dependent Indian community and, therefore, Indian country. Pet. 26a.[3]

"'The federal set-aside requirement ensures that the land in question is occupied by an "Indian community."'" *Id.* (quoting *Venetie*, 522 U.S. at 530). "[T]o qualify under the 'limited category' of land that constitutes a dependent Indian community, the land 'must have been set aside by the Federal Government for the use of the Indians as Indian

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[2] The petitioner apparently concedes that *Venetie* provides the applicable rule of law and that the Connecticut Supreme Court properly stated that rule. Pet. 3.

[3] Because the Connecticut Supreme Court held that the property was not set aside, it concluded that it "need not determine whether the Coachman property was under the superintendence of the United States before being taken into trust." Pet. 37a. As discussed in section III below, the lack of federal superintendence over the property provides additional support for the conclusion that the decision is correct and that the petition should be denied.

land. . . .'" Pet. 27a (quoting *Venetie*, 522 U.S. at 527). As this Court has held and the Connecticut Supreme Court recognized, the set-aside requirement serves two purposes:

> (1) it ensures that the land in question is occupied by an Indian community . . . and (2) it reflects the fact that because Congress has plenary authority over Indian affairs . . . some explicit action by Congress (or the Executive, acting under delegated authority) must be taken to create or to recognize Indian country.

Pet. 28a (quotation marks omitted); *see also Venetie*, 522 U.S. at 531 n.6. Recognizing the property at issue as set aside under the circumstances presented here would be inconsistent with both of those purposes.

Venetie establishes that the set aside requirement is intended to "ensure[] that the land in question is occupied by an 'Indian community'" and that "some explicit action by Congress (or the Executive, acting under delegated authority) must be taken to create or to recognize Indian country." *Venetie*, 522 U.S. at 531 & n.6. The only Congressional action taken with regard to the Property here was to identify it in the text of the Act as "private settlement land[]"—"privately held land" within "the eight hundred acres, more or less, . . . identified by a red outline on a map filed with the Secretary of the State of Connecticut" in accordance with the settlement agreement. 25 U.S.C. § 1752(3)(A) (Pet. 55a). By definition, expressly recognizing the land as "privately held" is not an explicit action by Congress indicating the land is "occupied by an 'Indian community'" for purposes of *Venetie*. *Venetie*, 522 U.S. at 531 & n.6. That alone is fatal to the petitioner's claim that Congress set aside the property for the Tribe.

Moreover, as the Connecticut Supreme Court correctly held, several other aspects of the Act's text unambiguously indicate that once the settlement funds were

disbursed, the Act "did not ensure that the remaining private settlement lands such as the Coachman property, were occupied by, and hence set aside for, the tribe." Pet. 30a. "First and foremost, the settlement act extinguished the tribe's aboriginal or tribal title to any of the private settlement lands as a condition of receiving the settlement fund." Pet. 30a-31a (citing 25 U.S.C. § 1753). Second, in "marked contrast" to another settlement act, the Act "provided a limited window of opportunity for the tribe to use the settlement fund to obtain private settlement lands" and expressly provides that once that time has passed the United States has "'no further trust responsibility to the Tribe or its members with respect to . . . any property *other than private settlement property purchased with these sums*.'" Pet. 32a (quoting 25 U.S.C. § 1754(b)(5)) (emphasis in decision). Lastly, "the focus of the settlement act clearly is on the disbursement of the settlement fund, not the purchase of the land." Pet. 34a. Thus, the text of the Act unambiguously establishes that it was not intended to set aside the privately held settlement lands, such as the Coachmen Property.

The petitioner seeks to avoid the unambiguous text of the statute by arguing that the Connecticut Supreme Court was required to apply the Indian canon of construction to re-write the Act to allow the Tribe to unilaterally and immediately create Indian country simply by purchasing land within the "private settlement lands" without any further action by Congress or the Secretary. Pet. 14. That argument is contrary to this Court's decision in *Chickasaw Nation*, which held that the Indian canon—like all other canons—is no more than a tool "designed to help judges determine the Legislature's intent as embodied in particular statutory language" and cannot be relied on to "produce an interpretation that . . . would conflict with the intent embodied in the statute Congress wrote." *Chickasaw Nation*, 534 U.S. at 94. Put differently, canons generally "ha[ve] no application in the absence of statutory

ambiguity. Any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution." *Dep't of Hous. v. Rucker*, 535 U.S. 125, 134-35 (2002) (quotation marks and citations omitted).

The Connecticut Supreme Court correctly held that the text of the Act unambiguously indicates that Congress did not intend the Act to allow the Tribe to "'obtain a valid claim to Indian country—and thus presumptive sovereignty rights—over theretofore privately-held lands just by purchasing them.'" Pet. 36a (quoting *Narragansett Indian Tribe of Rhode Island v. Narragansett Electric Co.*, 89 F.3d 908, 922 (1st Cir. 1996)). That would allow state and local governments to have lands taken out of their jurisdiction without notice or an opportunity to negotiate an agreement to avoid the resulting checkerboard of jurisdiction. *Id.* As this Court recently recognized, allowing a tribe to unilaterally create "[a] checkerboard of alternating state and tribal jurisdiction . . . would seriously burde[n] the administration of state and local governments and would adversely affect landowners neighboring the tribal patches." *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 219-20 (2005) (quotation marks omitted).

The Connecticut Supreme Court correctly held—based on a detailed analysis of the text of the Act—that it is "'implausible'" that Congress intended the Act to allow the Tribe to unilaterally impose such burdens on state and local governments and adjoining land owners. Pet. 36a (quoting *Narragansett Indian Tribe*, 89 F.3d at 922). The petitioner's efforts to have the Connecticut Supreme Court re-write the Act to reach that implausible result were rightly rejected and there is no need for this Court to review that decision.

III. THE DECISION BELOW IS CORRECT REGARDLESS OF HOW THE QUESTION PRESENTED IS DECIDED BECAUSE ALTERNATE GROUNDS DICTATE AFFIRMANCE

Because the Connecticut Supreme Court held that the Coachman Property was not set aside under *Venetie*, the court did not address whether the property was under federal superintendence before the United States took it into trust. Pet. 37a. As the trial court correctly held, it is clear that the Coachman Property was not under federal superintendence during the relevant time period. Pet. 50a. This fact provides an independent bar to the petitioner's claim that the property is a dependent Indian community and ensures that a decision by this Court would not change the result of this litigation.

Venetie holds that both "a federal set-aside *and* a federal superintendence requirement must be satisfied for a finding of a 'dependent Indian community.'" *Venetie*, 522 U.S. at 530 (emphasis in original). "[T]he federal superintendence requirement guarantees that the Indian community is sufficiently 'dependent' on the Federal Government that the Federal Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the land in question." *Id.* at 531. This inquiry focuses on the land at issue rather than who inhabits it. *Id.* at 534.

Here, the State had full jurisdiction to apply its laws to the petitioner's property prior to 1998, when the land was taken into trust. That is fatal to the petitioner's claim of federal superintendence. *Id.* at 531. The petitioner sought to avoid that clear bar below by arguing, without support, that federal acknowledgement, by definition, entails federal superintendence because the federal government supervises the political economic and social life of acknowledged tribes. Of course, this Court

explicitly rejected that argument in *Venetie*, holding "that it is *the land in question*, and not merely the Indian tribe inhabiting it, that must be under the superintendence of the Federal Government." *Id.* at 530 n.5 (emphasis in original).

The petitioner also sought to salvage her claim by arguing that the Act imposed a restraint on alienation of private settlement land that the Tribe acquired in fee with its own funds, even if those lands were not part of the reservation or taken into trust. That argument is contrary to the Act, which provides that lands are not subject to a restraint on alienation until they are taken into trust by the United States, with the exception of reservation land that—though technically held in fee by the Tribe—is expressly made subject to a restraint on alienation pursuant to the Non Intercourse Act. 25 U.S.C. § 1757(a) (Pet. 62a); *State of Conn. v. DOI*, 26 F. Supp. 2d 397, 405 n.18 (D. Conn. 1998), *rev'd on other grounds* 228 F.3d 82 (2d Cir. 2000) (concluding that § 1757(a)'s reference to "federal restraint against alienation" applies to the existing reservation of the tribe held in fee).

The petitioner apparently realized below that there was no support for her argument in the text or history of the Act. She cited with approval the district court's conclusion in *State of Connecticut* that the § 1757(a) reference to restraints on alienation was intended to create a trust relationship with regard to the existing reservation that was technically held in fee, but went on to argue—again without support—that the "Property which is subject of this appeal is no different than the status of the existing reservation . . . [and that] The Property should be deemed to be subject to a federal restraint against alienation pursuant to the Non Intercourse Act, just as the existing reservation is." Appellant's Reply Br., 12-13.

That argument lacks merit. The Act expressly extinguished the Tribe's aboriginal titles and Indian claims.

25 U.S.C. § 1753. Therefore, the Tribe no longer has any claim under the Non Intercourse Act in this State and that Act does not apply to the Property. Moreover, this Court has made clear "[t]hat the subsequent repurchase of reservation land by a tribe does not manifest any congressional intent to reassume federal protection of that land and to out state taxing authority—particularly where Congress expressly relinquished such protection many years before." *Cass County v. Leech Lake Chippewa Indians*, 524 U.S. 109, 114, 118 (1998). The State had jurisdiction over the land until it was taken into trust and the petitioner cannot establish federal superintendence. Therefore, a decision by this Court on the question presented will not impact this litigation and granting the petition will be a waste of the Court's valuable resources.

CONCLUSION

For all of the reasons set forth herein, the petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: July 14, 2006.